INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Rules involved	2
Statement	3
Argument	7
Conclusion	13

CITATIONS

Cases:

Catanco v. *United States*, 167 F. 2d 820	12
Crowe v. *DiManno*, 225 F. 2d 652	9
Dunaway v. *United States*, 205 F. 2d 23	12
Glasser v. *United States*, 315 U.S. 60	8
Jordan v. *United States*, 120 F. 2d 65	12
Schumacher v. *United States*, 216 F. 2d 780, certiorari denied, 348 U.S. 951	8
Simon v. *United States*, 123 F. 2d 80, certiorari denied, 314 U.S. 694	8
United States v. *Aaron*, 190 F. 2d 144, certiorari denied *sub nom. Freidus* v. *United States*, 342 U.S. 827	8
United States v. *Breen*, 96 F. 2d 782, certiorari denied, 304 U.S. 585	8
United States v. *Giallo*, 206 F. 2d 207, affirmed per curiam, 346 U.S. 929	7
United States v. *Rosenblum*, 176 F. 2d 321, certiorari denied, 338 U.S. 893	12

Rules:

Federal Rules of Criminal Procedure:

Rule 8(b)	2, 11
13	2, 11, 12
14	3, 13

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 876

THOMAS F. DALEY, ARTHUR F. DUNNETT, LOUIS FRONGELLO (Alias), JAMES J. PALMISANO, EDWARD LAVALLE, ANGELO ROSSETTI, AND FRANCIS JUDD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 18-31; R. 1097-1110) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 30, 1956 (R. 1110). The petition for a writ of certiorari was filed on April

18, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court's conduct deprived petitioners of a fair trial.

2. Whether the court erred in ordering consolidation of separate informations against seven petitioners, each charged with engaging, on the same date and at the same location, in a gambling business without registration and payment of the required occupational tax.

RULES INVOLVED

Pertinent Federal Rules of Criminal Procedure are:

> RULE 8(b). JOINDER OF DEFENDANTS. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.
>
> RULE 13. TRIAL TOGETHER OF INDICTMENTS OR INFORMATIONS. The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or

information. The procedure shall be the same as if the prosecution were under such single indictment or information.

RULE 14. RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of count, grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT

In seven separate informations, it was charged as to each petitioner under count one that on or about May 29, 1953 at Revere, Massachusetts he "did engage in the business of accepting wagers and of conducting a lottery and of conducting a wagering pool, as defined in 26 U.S.C. 3285, and did wilfully fail prior to the commencement of said business engagements to pay the special occupational tax as required by 26 U.S.C. 3290 * * * in violation of 26 U.S.C. 3294 and 2707(b)." Count two charged failure to register for such gambling business in accordance with the above statutes (R. 22). Over petitioners' objections, the court ordered the informations consolidated for trial (R. 23, 24).

The jury found all petitioners guilty under both counts (R. 1080-1082). They were given varying sentences of imprisonment and fines, the heaviest

sentence being one year's imprisonment and a $2,500 fine (R. 2-3, 5-6, 8-9, 11-12, 14-15, 17, 20-21). All petitioners appealed (R. 3, 6, 9, 12, 15, 18, 21). In an opinion by Chief Judge Magruder, the Court of Appeals unanimously affirmed the convictions (Pet. 19-31).

Evidence adduced at the trial may be summarized briefly as follows:

One Horkun, the owner of premises at 560 Winthrop Avenue in Revere, Massachusetts, operated a gas station there and also resided there (R. 289-290). In February, 1953, petitioner "Monge" Rossetti rented for $50 per month a room in Horkun's cellar, ostensibly for a club for seven to eight members (R. 294-297). Petitioner Dunnett later paid Horkun for two months' rent (R. 299, 300). At Rossetti's request, Horkun, who already had a pay telephone in his gas station, ordered another telephone installed in his office under his own name (R. 305-307). Horkun permitted Rossetti to take this phone to the cellar room without notifying the telephone company (R. 308). Rossetti gave Horkun the money to pay the telephone bill (R. 310, 318). In late February, after asking Horkun for a key to the garage and saying, "We are going to put in a couple of telephones", Rossetti obtained permission to put a hole in the garage wall (R. 308-309). Altogether the occupants of the cellar had about six or seven lines available for incoming and outgoing calls (R. 339, 341-349, 359-362).

On March 10, 1952, Cosgrove, a Cambridge policeman, had observed petitioners Palmisano, LaValle, and Dunnett in Cambridge at 90 Broadway, where there were a number of telephones, horse racing and numbers sheets, and a radio. Palmisano told Cosgrove he had been working "booking the horses and the numbers" (R. 488-489, 532-533). Later these petitioners were observed at premises at Ocean Avenue in Revere (R. 486-487), and then the police surveillance was changed to 560 Winthrop Avenue in Revere (R. 482-485, 536-537). The police did not see any persons other than petitioners going in or out of 560 Winthrop (R. 482, 484, 485).

On two previous occasions Cosgrove had gone to the Revere police with information regarding his surveillance of petitioners, but nothing was ever done about it (R. 58). On May 29, 1953, Cosgrove went to the District Attorney for Suffolk County, and later that day to the Revere Police Department, where a Revere raiding detail was assigned (R. 54, 496). The police then raided the premises at 560 Winthrop Avenue, where all seven petitioners were present (R. 461, 463-467, 562, 662, 765). On the premises were two tabulating machines, six telephones, a switchboard, three radios, papers, pads, tally sheets, and numerous slips with horse plays and numbers plays registered on them, which were seized under a search warrant obtained by the Revere police. These items were later turned over to the federal authorities and introduced in evidence at the trial

(R. 178, 457, 460, 468, 469, 540-541, 543, 544-545, 563-566, 576-585, 587, 592-594, 795, 799, 814-816). The total amount bet for the week of May 18 was $32,873.07, and for the week of May 25 was $22,-768.31 (R. 201). An Internal Revenue agent, qualified as an expert in gambling cases, gave his opinion that 560 Winthrop Avenue was "a nerve center, a telephone center where all the different agents would put their bets into, and that was part of it, that is part of the 'syndicate'" (R. 204-205).

At the time of the raid, Dunnett answered a telephone, saying "There will be no more bets on the speed of the beast" (R. 668). Rossetti was heard to make a loud remark in a telephone conversation, "The cops are here; we are out of business" (R. 166, 461, 463). Daley answered another phone, "Out of business. Don't you understand?" (R. 666). Police officers answered telephone calls announcing racing results (R. 148-150, 178-179). Palmisano was seen answering a telephone, and Frongello was seated at a telephone with a pencil, pad, and tally sheets (R. 464, 466, 771). When LaValle was led to the patrol wagon after the arrests, he stated he would like to punch Cosgrove in the nose, and at the police station he called Cosgrove obscene names (R. 463, 718, 803-805). At the police station, Dunnett at first told the officers that he had not been employed at 560 Winthrop Avenue, but later he said that "he didn't intend to be a wise fellow but that he would tell us * * * that he worked there" (R. 151, 806-807, 809).

Petitioner Palmisano had registered and paid the $50 wagering tax for the fiscal year ending June 30, 1952 (R. 917-918). The evidence, however, was undisputed that all seven petitioners had not registered and had not been issued the $50 occupational tax stamp for the fiscal year from July 1, 1952 through June 30, 1953, and had not complied with the provisions of the law on May 29, 1953, the date of the violations charged in the informations (R. 919-920).

Petitioners rested their cases without presenting any evidence (R. 921).

ARGUMENT

1. Petitioners' principal contention is that the trial court showed partisan zeal in acting as a prosecuting attorney with the result that they were denied a fair trial (Pet. 3-9, 10-15). The court below, after reading "the voluminous transcript from cover to cover," was of the unanimous opinion that this contention was "entirely unwarranted" (Pet. 28).

a. The trial court properly sought to ferret out the truth by examining witnesses, in order to obtain a completely accurate picture of all the facts, both for his own benefit and that of the jury. Although numerous questions were asked, the fact that the true situation as elicited by the inquiries turned out to be adverse to the defense rather than the prosecution does not show improper advocacy on the part of the judge, who acted well within the bounds of permissible discretion in conducting the trial. Cf. *United States* v. *Giallo*, 206 F. 2d 207

(C.A. 2), affirmed per curiam, 346 U.S. 929; *Glasser* v. *United States*, 315 U.S. 60, 82; *Schumacher* v. *United States*, 216 F. 2d 780 (C.A. 8), certiorari denied, 348 U.S. 951; *United States* v. *Aaron*, 190 F. 2d 144, 146 (C.A. 2), certiorari denied *sub nom. Freidus* v. *United States*, 342 U.S. 827; *United States* v. *Breen*, 96 F. 2d 782, 784 (C.A. 2), certiorari denied, 304 U.S. 585; *Simon* v. *United States*, 123 F. 2d 80, 83 (C.A. 4), certiorari denied, 314 U.S. 694.

Examination of the record discloses that the trial court did not have a partial attitude antagonistic to petitioners. Throughout the trial the court made numerous rulings in favor of petitioners (e.g., R. 337, 392, 400, 401, 438, 459, 465, 561, 596, 749, 812-813), and in one instance excluded hearsay evidence *sua sponte* (R. 795). The court stated that the two defense attorneys, Thompson and McLaughlin,[1] were "doing all right" on the trial (R. 630); called them "two fine lawyers" (R. 897); and stated that he was proud of them (R. 897, 898, 430, 433, 497-498, 683).[2] The court, moreover, during the course of the trial (R. 102, 141, 194, 232, 243, 428, 686, 720, 952) and in its final charge (R. 1040, 1041-1042, 1043, 1044, 1045, 1047, 1057), comprehensively informed the jurors

[1] Thompson represented petitioners Frongello, Judd, and Palmisano (R. 599), and McLaughlin was counsel for petitioners Daley, Dunnett, LaValle, and Rossetti (R. 234).

[2] The court declared a recess during the trial so that attorney McLaughlin could arrange to take his 18 months' old child, who had started to run a high fever, to the hospital (R. 614-616).

as to the presumption of petitioners' innocence and the fact that the government had the burden of proving their guilt beyond reasonable doubt.[3]

b. The court's questioning of government witnesses Horkun and Rubin (see Pet. 3-6) was within its authorized discretion in eliciting a full and truthful disclosure of facts from reluctant witnesses. As to Horkun, the court was skeptical as to how he could rent the cellar room for $50 per month with no idea that it would be used for illegal purposes and without inquiring as to the name or purposes of the club (R. 26). The court also brought out that Horkun had conducted his business for four years without having occasion to request a telephone until Rossetti asked for one (R. 29). As to Rubin, a tenant in the apartment next door to Horkun's premises, the court was dubious about his apparent claim of ignorance of facts regarding the tapping of his telephone. The court drew from Rubin an admission that he thought his telephone was being used for an illegal purpose and that he did not report this to the

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[3] *Crowe* v. *DiManno*, 225 F. 2d 652 (C.A. 1), a personal injury case in which a new trial was granted by reason of Judge McCarthy's misconduct in favoring the plaintiff (stressed by petitioners at Pet. 11-13), is clearly distinguishable, as shown by the fact that the Court of Appeals which reversed in that case did not do so here. Unlike the instant case, in *Crowe* v. *DiManno* the court interrupted defense counsel during closing argument to make two "erroneous statements of fact" which the Court of Appeals considered "enough to warrant a new trial" (225 F. 2d at 658). There was, moreover, in that case extremely hostile cross-examination of witnesses, a condition not present here.

authorities because of fear of becoming involved (R. 33, 34, 37, 38-39).

The court's statement at R. 51 (Pet. 6-7) was made after exclusion of a defense question, which attorney Thompson persisted in pursuing, and was proper in every respect.

Prior to the court's statement at R. 57, 61 (Pet. 7), defense counsel had brought out on cross-examination that Cosgrove had been relieved of his position as head of the Crime Prevention Department in Cambridge and that his assignment had been changed to that of a uniformed night sergeant (R. 491-492). The court pointed out that defense counsel was attempting to show that Cosgrove's demotion resulted from his activities in Revere. In this context, the court remarked that an officer had to be like a good soldier and do what he was told, and went on to express respect for the Cambridge Chief of Police, implying that the Chief had done nothing wrong in changing Cosgrove's assignment. Although the remark about the Chief was perhaps superfluous, it manifestly did not prejudice the petitioners' cases.

As to the colloquy at R. 94, 95 (Pet. 7-8), the court was merely excluding a question by attorney Thompson, which had just been ruled out a few questions before (R. 609). Counsel, nevertheless, improperly persisted in pursuing this course.

The incident at R. 134 (Pet. 8) involved an attempt by defense counsel to get police officer McLaughlin to say that he could not testify that

the papers introduced in evidence were the same as those he had seen at the raid at 560 Winthrop Avenue. The witness had previously testified that the papers were similar, but that he could not say whether they were the same (R. 694). In this context, since the question had already been answered in petitioners' favor, and since defense attorney McLaughlin admitted to the court that he was making no claim that the exhibits were a recent invention, the court acted well within its discretion in stopping further inquiry on this subject (R. 135).

Immediately preceding the colloquy at R. 147 (Pet. 8-9), the court had excluded a defense question on recross-examination since not raised on redirect examination (R. 146), but defense counsel persisted in pursuing the same inquiry. In this setting the court properly made its remark to the effect that counsel would have to be governed by its rulings.

The conclusion of the Court of Appeals that petitioners had a fair trial is therefore fully supported.

2. Petitioners argue that the trial court committed reversible error in permitting consolidation of the seven informations in that technically each offense was separate. The fact that each committed a similar but not the same offense, they argue, did not warrant consolidation (Pet. 15-17).

Under Rule 13, *supra*, pp. 2-3, consolidation is permitted if the charges could have been joined under Rule 8(b), *supra*, p. 2, which permits joinder

of defendants "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." When that rule provides further that such "defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count", it contemplates such a situation as that presented here where defendants were separately charged as to a closely interrelated activity. Each of the petitioners was alleged to have participated on the same day and location in the same transaction, *viz.*, the gambling business, at a time when each admittedly failed to pay the occupational tax and to register in accordance with the applicable statutes. This identical composite transaction constituted substantially the same offense as to each of the seven petitioners. Accordingly, the consolidation of the informations under Rule 13 (*supra*, pp. 2-3) was well within the trial court's discretion. Cf. *Catanco* v. *United States*, 167 F. 2d 820, 822-823 (C.A. 4); *Jordan* v. *United States*, 120 F. 2d 65, 66 (C.A. 5); *United States* v. *Rosenblum*, 176 F. 2d 321, 324 (C.A. 7), certiorari denied, 338 U.S. 893.

The principles guiding an appellate court on this issue were stated in *Dunaway* v. *United States*, 205 F. 2d 23, 25 (C.A. D.C.), as follows: "in deciding whether new trials should be awarded now we must review the record * * * in the light of what actually occurred after the consolidated trials went forward, not merely in terms of

what might have been a proper course for the court to have pursued when the motions respecting consolidation were made." As the trial proceeded, if it had appeared that petitioners were being prejudiced by the consolidation, they could have moved for a severance under Rule 14, *supra*, p. 3, and the granting of such motion would have been within the discretion of the trial court. Petitioners did not, however, do this, and even now they do not point to specific instances of prejudice resulting from the consolidation, as opposed to separate trials.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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